

Office of Dispute Resolution for Acquisition
Federal Aviation Administration
Washington, D.C.

Contests of)	
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Agency Tender Official)	Docket No. 05-ODRA-00342C
James H. Washington and)	Docket No. 05-ODRA-00343C
Kate Breen, As Agent for a Majority of)	
Directly Affected FAA Employees)	
<u>Pursuant to Solicitation DTFAAWAACA-76-001)</u>		

Decision on Protective Order Objections

INTRODUCTION

The consolidated Contests of Agency Tender Official James H. Washington (“ATO Contest”) and Kate Breen (“Breen Contest”) challenge the selection of Lockheed Martin Services, Inc. (“LMSI”) as the service provider in connection with a competition conducted pursuant to the FAA’s adaptation of Office of Management and Budget Circular A-76. The matter currently before the Office of Dispute Resolution for Acquisition (“ODRA”) concerns the applications of three individuals (“Applicants”) for admission to the Protective Order issued in this case on March 14, 2005, and amended on March 17, 2005. For the reasons discussed herein, the ODRA sustains the objections of the FAA Competitive Sourcing Program Office (“Program Office”) and LMSI and denies, without prejudice, the admissions of the individuals involved to the Protective Order.

DISCUSSION

On March 15, 2005, counsel for the Agency Tender Official (“ATO”) forwarded applications for admission to the Protective Order and stated in his forwarding letter that the applications are being made “on behalf of outside counsel for Harris Corporation.

Harris Corporation is a Teaming Partner of the MEO, and these outside counsel appear as additional counsel for the MEO.” ATO Letter at 1. The Applicants are three individuals, *i.e.*, William W. Thompson, Jr., Jeffrey B. Krashin and Michael A. Branca, all attorneys with the law firm of Thompson and Waldron. These applications (“Initial Applications”) of all three Applicants do not state that they are counsel for the MEO. Rather, they state that the Applicants “have been retained to represent Harris Corporation, a teaming partner of the Most Efficient Organization in the referenced competition.” *See* Applications at Paragraph 2. By letter of the same date, counsel for LMSI objected to the Initial Applications. In support of its objection, LMSI cites to the provisions of the Protective Order limiting admission to “counsel for a party” or an “expert or consultant appearing for or otherwise representing a party”. *See* Protective Order at Paragraphs 4, 5. Counsel for LMSI goes on to allege that the applicants represent an entity, *i.e.*, Harris Corporation, which is not a party and is not eligible to become a party. LMSI Objection at 1.

A subcontractor or team member does not qualify as a directly interested party under ODRA’s Procedures because it is neither an Agency Tender Official, a single individual appointed by a Majority of Directly Affected FAA Employees as their Agent, a public agency or agency component, or a “private sector offeror.”

See LMSI Objection at 1, *citing* ODRA Contest Rule 2(g). LMSI’s Objection further notes, on page 2, that: “Applicants do not purport to be representing (*i.e.*, have an attorney – client relationship with) the Agency Tender Official, the party whose Legal Agent has tendered their applications.”

On March 17, 2005, the Program Office also filed an Objection to the Initial Applications, stating grounds similar to those of LMSI’s Objection. The Program Office Objection states:

Under the ODRA regulations and FAA’s Acquisition Management System, proposed subcontractors are expressly excluded from the definition of “interested party”.... Under ODRA’s A-76 contest rule definitions, which “supplement” the definitions in the regulations, a private sector entity must have submitted an offer in connection with a competition in order to be a directly interested party.

See Program Office Objection at 1. The Program Office also notes that the Initial Applications appear to contradict the statements of the ATO counsel's letter forwarding the Initial Applications, with respect to whether the Applicants represent Harris Corporation or the ATO.

Both counsel for the ATO and the Applicants were provided an opportunity to respond to the objections. Both filed Responses on March 21, 2005. The ATO Response refutes the allegation that Harris Corporation is a "subcontractor" and states that Harris is "a potential prime contractor to the Most Efficient Organization." ATO Response at 1 and 2. The ATO Response goes on to support its argument by noting that the Most Efficient Organization proposal involves a single source award of a contract to Harris Corporation.

The Applicants' Responses to the objections contend that Harris is not a subcontractor but rather a "teaming partner" of the MEO and that "if the Contest is sustained, Harris will become a prime contractor of the FAA." Applicants' Response at 1 and 2. The Applicants go on to argue that assistance of the Harris Corporation is necessary to a challenge of the ratings of the MEO and that the ODRA Regulations do not expressly preclude the admission of the Applicants. Finally, the Applicants' Response included modified applications ("Modified Applications") which seek to have the Applicants admitted in the role of "a consultant and advisor to the MEO and its counsel."

Thereafter, counsel for LMSI sought and obtained permission from the ODRA to file a brief supplementary Reply to the Responses of the ATO and the Applicants. That Supplementary Response was received on March 22, 2005. LMSI reiterates that Harris is not a "directly interested party" and that since "it is not a party and does not seek to become a party, its counsel cannot file an application for access as counsel for a party." LMSI Reply at 2. LMSI also notes that, with respect to the Applicants' claim that they serve as "consultants" to the MEO, "ODRA Rules and practices prescribe a different form of application for consultants, which requires different information and different representations and agreement to a two-year period in which the person cannot engage in certain proposal preparation activities." LMSI Reply at 2.

After reviewing the Initial Applications and the Modified Applications, the ODRA concludes they must be denied in their present form. The applications do not claim that the Applicants have been hired as counsel for the ATO in this matter. Nor do the Applicants claim to be counsel for a party or for an entity that is eligible to become a party in the Contest. Harris Corporation has not been shown to be a potential service provider and has not sought to contest the performance decision.¹ Thus, there is no basis for Applicants' admission as counsel for Harris Corporation under the ODRA Rules.²

The Amended Applications, which seek to have the admissions made on the basis that the individuals involved are "consultants" to the MEO, clearly are insufficient. As LMSI's Reply correctly notes, the Applicants have failed to provide the prescribed information and certifications required for admissions of consultants to Protective Orders in ODRA proceedings. The Initial and Modified Applications therefore are denied without prejudice.

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Anthony N. Palladino
Associate Chief Counsel and Director
FAA Office of Dispute Resolution for Acquisition

March 25, 2005

¹ The record at this stage, including the submissions of the ATO counsel and the Applicants, suggests that Harris, although identified as a teaming partner, actually would become a sole source contractor if the MEO had been selected as the service provider.

² Nothing in this decision prevents counsel for Harris from assisting counsel for the ATO, provided counsel for Harris does not have access to protected information of competitors or of the Program Office. Nor does this decision preclude the ATO's hiring of a consultant(s) and seeking to have the consultant(s) admitted to the Protective Order.